



# **Amendments to the Sentencing Guidelines**

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This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at [www.ussc.gov](http://www.ussc.gov) and will appear in a forthcoming edition of the Federal Register.

## TABLE OF CONTENTS

<b><u>AMENDMENT</u></b>	<b><u>PAGE NO.</u></b>
1. ALTERNATIVES TO INCARCERATION .....	1
2. SPECIFIC OFFENDER CHARACTERISTICS .....	10
3. CULTURAL ASSIMILATION .....	16
4. APPLICATION INSTRUCTIONS .....	19
5. RECENCY .....	22
6. HATE CRIMES .....	28
7. ORGANIZATIONAL GUIDELINES .....	31
8. MISCELLANEOUS AMENDMENT .....	44
9. TECHNICAL AMENDMENT .....	60

## 1. ALTERNATIVES TO INCARCERATION

**Reason for Amendment:** *This amendment is a two-part amendment expanding the availability of alternatives to incarceration. The amendment provides a greater range of sentencing options to courts with respect to certain offenders by expanding Zones B and C of the Sentencing Table by one level each and addresses cases in which a departure from imprisonment to an alternative to incarceration (such as intermittent confinement, community confinement, or home confinement) may be appropriate to accomplish a specific treatment purpose.*

*The amendment is a result of the Commission's continued multi-year study of alternatives to incarceration. The Commission initiated this study in recognition of increased interest in alternatives to incarceration by all three branches of government and renewed public debate about the size of the federal prison population and the need for greater availability of alternatives to incarceration for certain nonviolent first offenders. See generally 28 U.S.C. §§ 994(g), (j).*

*As part of the study, the Commission held a two-day national symposium at which the Commission heard from experts on alternatives to incarceration, including federal and state judges, congressional staff, professors of law and the social sciences, corrections and alternative sentencing practitioners and specialists, federal and state prosecutors and defense attorneys, prison officials, and others involved in criminal justice. See United States Sentencing Commission, Symposium on Alternatives to Incarceration (July 2008). In considering the amendment, the Commission also reviewed federal sentencing data, public comment and testimony, recent scholarly literature, current federal and state practices, and feedback in various forms from federal judges.*

*First, the amendment expands Zones B and C of the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level for each Criminal History Category (taking this area from Zone C), and expands Zone C by one level for each Criminal History Category (taking this area from Zone D). Accordingly, under the amendment, defendants in Zone C with an applicable guideline range of 8-14 months or 9-15 months are moved to Zone B, and defendants in Zone D with an applicable guideline range of 12-18 months are moved to Zone C. Conforming changes also are made to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1. In considering this one-level expansion, the Commission observed that approximately 42 percent of the Zone C offenders covered by the amendment and approximately 52 percent of the Zone D offenders covered by the amendment already receive sentences below the applicable guideline range.*

*The Commission estimates that of the 71,054 offenders sentenced in fiscal year 2009 for which complete sentencing guideline application information is available, 1,565 offenders in Zone C, or 2.2 percent, would have been in Zone B of the Sentencing Table under the amendment, and 2,734 offenders in Zone D, or 3.8 percent, would have been in Zone C. Not all of these offenders would have been eligible for an alternative to incarceration, however, because many were non-citizens who may have been subject to an immigration detainer and some were statutorily prohibited from being sentenced to a term of probation, see, e.g., 18 U.S.C. § 3561(a)(1) (prohibiting a defendant convicted of a Class A or Class B felony from being sentenced to a term of probation).*

*As a further reason for the zone expansion, Commission data indicate that courts often sentence offenders in Zone D with an applicable guideline range of 12-18 months to a term of imprisonment of 12 months and one day for the specific purpose of making such offenders eligible for credit for satisfactory behavior while in prison. See 18 U.S.C. § 3624(b). For such an offender, assuming the maximum "good time credit" is*

*earned, the sentence effectively becomes approximately ten and one-half months. Given that prior to the amendment the highest guideline range in Zone C was 10-16 months, the Commission determined that offenders in Zone D with an applicable guideline range of 12-18 months, many of whom effectively serve a sentence at the lower end of the highest Zone C sentencing range, should be included in Zone C.*

*Second, the amendment clarifies and illustrates certain cases in which a departure may be appropriate to accomplish a specific treatment purpose. Specifically, it amends an existing departure provision at §5C1.1 (Imposition of a Term of Imprisonment), Application Note 6. As amended, the application note states that a departure from the sentencing options authorized for Zone C of the Sentencing Table to accomplish a specific treatment purpose should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.*

*Under the application note as amended, the court may depart from the sentencing options authorized for Zone C (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) to accomplish a specific treatment purpose. The application note also provides that, in determining whether such a departure is appropriate, the court should consider, among other things, two factors relating to public safety: (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant. Some public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public. Accordingly, the Commission amended the application note to clarify the criteria and to provide examples of such cases.*

*The amendment also makes two other changes to the Commentary to §5C1.1 regarding the factors to be considered in determining whether to impose an alternative to incarceration. The amendment adds an application note providing that, in a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the treatment program. The amendment also deletes as unnecessary the second sentence of Application Note 7.*

**Amendment:**

**Part A:**

**§5C1.1. Imposition of a Term of Imprisonment**

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --
- (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
  - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --
- (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:
- (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
  - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
  - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

6. ~~There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and, there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.~~

There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other considerations, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12-18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

7. ~~The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.~~
8. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
89. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve

*months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

**Part B:**

Chapter Five, Part A, is amended in the Sentencing Table by redesignating Zones A, B, C, and D (as designated by Amendment 462, see USSG Appendix C, Amendment 462 (effective November 1, 1992)) as follows: Zone A (containing all guideline ranges having a minimum of zero months); Zone B (containing all guideline ranges having a minimum of at least one but not more than nine months); Zone C (containing all guideline ranges having a minimum of at least ten but not more than twelve months); and Zone D (containing all guideline ranges having a minimum of fifteen months or more).

The amendment to the Sentencing Table, as executed, is as follows (with the existing boundaries of Zones B and C marked with straight lines; the new lower boundary of Zone B shaded; and the new lower boundary of Zone C marked with a wavy line):

# SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life



**§5B1.1. Imposition of a Term of Probation**

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
  - (1) the applicable guideline range is in Zone A of the Sentencing Table; or
  - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).
- (b) A sentence of probation may not be imposed in the event:
  - (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
  - (2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);
  - (3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*
  - (a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.
  - (b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement,

*home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.*

2. *Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~eight~~ten months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).*

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

\* \* \*

#### **§5C1.1. Imposition of a Term of Imprisonment**

\* \* \*

#### Commentary

#### Application Notes:

\* \* \*

3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months), the court has three options:*

\* \* \*

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ~~eight, nine, or ten months~~ten or twelve months), the court has two options:*

- (A) *It may impose a sentence of imprisonment.*
- (B) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range*

*must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is ~~8-14~~10-16 months, a sentence of ~~four~~five months imprisonment followed by a term of supervised release with a condition requiring ~~four~~five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*

*The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is ~~8-14~~10-16 months, both a sentence of ~~four~~five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ~~five~~ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.*

*\* \* \**

8. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~twelve~~15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

## 2. SPECIFIC OFFENDER CHARACTERISTICS

**Reason for Amendment:** *This multi-part amendment revises the introductory commentary to Chapter Five, Part H (Specific Offender Characteristics), amends the policy statements relating to age, mental and emotional conditions, physical condition, and military service, and makes conforming changes to §5K2.0 (Grounds for Departure). The amendment is a result of a review of the departure provisions in the Guidelines Manual begun by the Commission this year. See 74 Fed. Reg. 46478, 46479 (September 9, 2009). The Commission undertook this review, in part, in response to an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased use of variances.*

*First, the amendment revises the introductory commentary to Chapter Five, Part H. As amended, the introductory commentary explains that the purpose of Part H is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," Gall v. United States, 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," 28 U.S.C. § 991(b)(1)(B), and "promote respect for the law," 18 U.S.C. § 3553(a)(2)(A).*

*Accordingly, the amended introductory commentary outlines three categories of specific offender characteristics described in the Sentencing Reform Act and the statutory and guideline standards that apply to consideration of each category. Courts must consider "the history and characteristics of the defendant" among other factors. See 18 U.S.C. § 3553(a). However, in order to avoid unwarranted sentencing disparities, see 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), courts should not give specific offender characteristics excessive weight. The guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark." Gall, *supra*, at 49.*

*The amended introductory commentary also states that the Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as contemplated by the Sentencing Reform Act. See, e.g., 28 U.S.C. § 995(a)(12)(A). The Commission expects that providing such information on an ongoing basis will promote nationwide consistency in the consideration of specific offender characteristics by courts and help avoid unwarranted sentencing disparities.*

*Second, the amendment amends several policy statements that cover specific offender characteristics addressed in 28 U.S.C. § 994(d): §§5H1.1 (Age), 5H1.3 (Mental and Emotional Conditions), and 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction). As amended, these policy statements generally provide that age; mental and emotional conditions; and physical condition or appearance, including physique, "may be relevant in determining whether a departure is warranted, if [the offender characteristic], individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." The Commission adopted this departure standard after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges.*

*The amendment also amends §§5H1.3 and 5H1.4 to provide that in certain cases described in Application Note 6 to §5C1.1 (Imposition of a Term of Imprisonment) a departure may be appropriate.*

*Third, the amendment amends §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related*

*Contributions; Record of Prior Good Works) to draw a distinction between military service and the other circumstances covered by that policy statement. As amended, the policy statement provides that military service "may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines". The Commission determined that applying this departure standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing. See, e.g., *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . .").*

*Finally, the amendment makes conforming changes to §5K2.0 (Grounds for Departure).*

**Amendment:**

**(A) Introductory Commentary**

**PART H - SPECIFIC OFFENDER CHARACTERISTICS**

*Introductory Commentary*

~~*The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission.*~~

*This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the "Act") contains several provisions regarding specific offender characteristics:*

*First*, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five characteristics – race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. § 994(d).

*Second*, the Act directs the Commission to consider whether eleven specific offender characteristics, "among others", have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. See 28 U.S.C. § 994(d).

*Third*, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. See 28 U.S.C. § 994(e).

*Fourth*, the Act also directs the sentencing court, in determining the particular sentence to be

imposed, to consider, among other factors, "the history and characteristics of the defendant". See 18 U.S.C. § 3553(a)(1).

Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, see 28 U.S.C. §994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). See §5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, see 28 U.S.C. § 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). See §5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. See, e.g., §§2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).

The Supreme Court has emphasized that the advisory guideline system should "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." See United States v. Booker, 543 U.S. 220, 264-65 (2005). Although the court must consider "the history and characteristics of the defendant" among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, see 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark." Gall v. United States, 552 U.S. 38, 49 (2007).

Accordingly, the purpose of this Part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," see Gall v. United States, 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," see 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), "provide certainty and fairness," see 28 U.S.C. § 991(b)(1)(B), and "promote respect for the law," see 18 U.S.C. § 3553(a)(2)(A).

*This Part allocates specific offender characteristics into three general categories.*

*In the first category are specific offender characteristics the consideration of which Congress has prohibited (e.g., §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.*

*In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. See 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (e.g., age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the*

applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.

~~The Commission has determined that certain circumstances~~ In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. See 28 U.S.C. § 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, ~~or to the determination of various other incidents~~ aspects of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).

~~In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.~~

As with the other provisions in this manual, these policy statements "are evolutionary in nature". See Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. See, e.g., 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a "clearinghouse and information center" on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the "forbidden factors" specified in 28 U.S.C. § 994(d) and (B) the "discouraged factors" specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

**(B) Chapter Five, Part H Policy Statements**

**§5H1.1. Age (Policy Statement)**

Age (including youth) ~~is not ordinarily relevant in determining whether a departure is warranted~~ may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

\* \* \*

**§5H1.3. Mental and Emotional Conditions (Policy Statement)**

Mental and emotional conditions ~~are not ordinarily relevant in determining whether a departure is warranted~~ may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also, ~~except as provided in~~ Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

\* \* \*

**§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)**

Physical condition or appearance, including physique, ~~is not ordinarily relevant in determining whether a departure may be warranted~~ may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. ~~However, an~~ An extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be



sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the ~~supervisory body~~ probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1. Application Note 6.

~~Similarly, where~~In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

\* \* \*

**§5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)**

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

~~Military, civic~~Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

**(C) §5K2.0**

**§5K2.0. Grounds for Departure (Policy Statement)**

\* \* \*

(d) PROHIBITED DEPARTURES.—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

- (1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the ~~third and last sentences~~ last sentence of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).

\* \* \*

### 3. CULTURAL ASSIMILATION

**Reason for Amendment:** *This amendment addresses when a downward departure may be appropriate in an illegal reentry case sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of the defendant's cultural assimilation to the United States.*

*Several circuits have upheld departures based on cultural assimilation. See, e.g., United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998); United States v. Lipman, 133 F.3d 726, 730 (9th Cir. 1998). Other circuits have declined to rule on whether such a departure may be warranted. See, e.g., United States v. Galarza-Payan, 441 F.3d 885, 889 (10th Cir. 2006) ("We need not address that debate in the altered post-Booker landscape."); United States v. Melendez-Torres, 420 F.3d 45, 51 n.3 (1st Cir. 2005); see also United States v. Ticas, 219 F. App'x 44, 45 (2d Cir. 2007) (acknowledging that the Second Circuit has never recognized cultural assimilation as a basis for a downward departure). Some circuits, though not foreclosing the possibility of cultural assimilation departures, have stated that district courts are within their discretion to deny such departures in light of a defendant's criminal past and society's increased interest in "keeping aliens who have committed crimes out of the United States following their deportation." United States v. Roche-Martinez, 467 F.3d 591, 595 (7th Cir. 2006); see also Galarza-Payan, supra, at 889-90 (stating that "in assessing the reasonableness of a sentence [] a particular defendant's cultural ties must be weighed against other factors such as (1) sentencing disparities among defendants with similar backgrounds and characteristics, and (2) the need for the sentence to reflect the seriousness of the crime and promote respect for the law").*

*In order to promote uniform consideration of cultural assimilation by courts, the amendment adds an application note to §2L1.2 providing that a downward departure may be appropriate on the basis of cultural assimilation. The application note provides that such a departure may be appropriate if (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant. The application note also provides a non-exhaustive list of factors the court should consider in determining whether such a departure is appropriate.*

#### **Amendment:**

#### **§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
  - (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;
- (C) a conviction for an aggravated felony, increase by 8 levels;
- (D) a conviction for any other felony, increase by 4 levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

\* \* \*

7. Departure ~~Consideration~~ Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.
8. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

*In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the*

*defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.*

#### 4. APPLICATION INSTRUCTIONS

**Reason for Amendment:** *This amendment amends §1B1.1 (Application Instructions) in light of United States v. Booker, 543 U.S. 220 (2005), and subsequent case law.*

*As explained more fully in Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) of the Guidelines Manual, a district court is required to properly calculate and consider the guidelines when sentencing. See 18 U.S.C. § 3553(a)(4); Booker, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); Rita v. United States, 551 U.S. 338, 347-48 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").*

*After determining the guideline range, the district court should refer to the Guidelines Manual and consider whether the case warrants a departure. See 18 U.S.C. § 3553(a)(5). "'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." Irizarry v. United States, 128 S.Ct. 2198, 2202 (2008). A "variance" – i.e., a sentence outside the guideline range other than as provided for in the Guidelines Manual – is considered by the court only after departures have been considered.*

*Most circuits agree on a three-step approach, including the consideration of departure provisions in the Guidelines Manual, in determining the sentence to be imposed. See United States v. Dixon, 449 F.3d 194, 203-04 (1st Cir. 2006) (court must consider "any applicable departures"); United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) (court must consider "available departure authority"); United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006) (same); United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker"); United States v. Tzep-Mejia, 461 F.3d 522, 525 (5th Cir. 2006) ("Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." (internal footnote and citation omitted)); United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006) (district court "still required to consider . . . whether a Chapter 5 departure is appropriate"); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance (internal quotation omitted)); United States v. Robertson, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); United States v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). But see United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2006) (stating that departures are "obsolete").*

*The amendment resolves the circuit conflict and adopts the three-step approach followed by a majority of circuits in determining the sentence to be imposed. The amendment restructures §1B1.1 into three subsections to reflect the three-step process. As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted. Subsection (c) addresses the need to consider the applicable factors under 18 U.S.C. § 3553(a) taken as a whole in determining the appropriate sentence. The amendment also adds*

*background commentary referring to the statutory requirements of 18 U.S.C. § 3553(a) and defining the term "variance" as "a sentence that is outside the guidelines framework".*

**Amendment:**

**§1B1.1.      Application Instructions**

- (a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying ~~Except as specifically directed,~~ the provisions of this manual ~~are to be applied~~ in the following order, except as specifically directed:
  - (a1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.
  - (b2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
  - (c3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
  - (d4) If there are multiple counts of conviction, repeat steps ~~(a)~~(1) through ~~(c)~~(3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
  - (e5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
  - (f6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
  - (g7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
  - (h8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (ib) The court shall then consider ~~Refer to~~ Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and ~~to~~ any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. See 18 U.S.C. § 3553(a)(5).

- (c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. See 18 U.S.C. § 3553(a).

Commentary

Application Notes:

\* \* \*

Background: The court must impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). See 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a "variance". See Irizarry v. United States, 128 S. Ct. 2198, 2200-03 (2008) (describing within-range sentences and departures as "sentences imposed under the framework set out in the Guidelines").

## 5. RECENCY

**Reason for Amendment:** *This amendment addresses a factor included in the calculation of the criminal history score in Chapter Four of the Guidelines Manual. Specifically, this amendment eliminates the "recency" points provided in subsection (e) of §4A1.1 (Criminal History Category). Under §4A1.1(e), one or two points are added to the criminal history score if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under subsection (a) or (b) or while in imprisonment or escape status on such a sentence. In addition to recency, subsections (a), (b), (c), (d), and (f) add points to the criminal history score to account for the seriousness of the prior offense and the status of the defendant. These other factors remain included in the criminal history score after the amendment.*

*The amendment is a result of the Commission's continued review of criminal history issues. This multi-year review was prompted in part because criminal history issues are often cited by sentencing courts as reasons for imposing non-government sponsored below range sentences, particularly in cases in which recency points were added to the criminal history score under §4A1.1(e).*

*As part of its review, the Commission undertook analyses to determine the extent to which recency points contribute to the ability of the criminal history score to predict the defendant's risk of recidivism. See generally USSG Ch. 4, Pt. A, intro. comment ("To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered."). Recent research isolating the effect of §4A1.1(e) on the predictive ability of the criminal history score indicated that consideration of recency only minimally improves the predictive ability.*

*In addition, the Commission received public comment and testimony suggesting that the recency of the instant offense to the defendant's release from imprisonment does not necessarily reflect increased culpability. Public comment and testimony indicated that defendants who recidivate tend to do so relatively soon after being released from prison but suggested that, for many defendants, this may reflect the challenges to successful reentry after imprisonment rather than increased culpability.*

*Finally, Commission data indicated that many of the cases in which recency points apply are sentenced under Chapter Two guidelines that have provisions based on criminal history. The amendment responds to suggestions that recency points are not necessary to adequately account for criminal history in such cases.*

### **Amendment:**

#### **§4A1.1. Criminal History Category**

The total points from ~~items~~ subsections (a) through ~~(f)~~(c) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4



points for this ~~item~~subsection.

- (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- ~~(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.~~
- (fe) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this ~~item~~subsection.

Commentary

\* \* \*

Application Notes:

1. §4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this ~~item~~subsection. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

*Certain prior sentences are not counted or are counted only under certain conditions:*

*A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. See §4A1.2(e).*

*A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this ~~item~~subsection only if it resulted from an adult conviction. See §4A1.2(d).*

*A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. See §4A1.2(h) and (j) and the Commentary to §4A1.2.*

2. §4A1.1(b). Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this ~~item~~subsection. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

\* \* \*

3. §4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this ~~item~~subsection. The term "prior sentence" is defined at §4A1.2(a).

\* \* \*

4. §4A1.1(d). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this ~~item~~subsection, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this ~~item~~subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).

- ~~5. §4A1.1(e). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if two points are added under §4A1.1(d), only one point is added under §4A1.1(e).~~

65. §4A1.1(fe). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are counted as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(fe) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(fe). For purposes of this guideline, "crime of violence" has the meaning given that term in §4B1.2(a). See §4A1.2(p).

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are counted as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(fe) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(fe) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second

sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

*Background:* Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

~~Subdivisions~~Subsections (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(d) ~~implements one measure of recency by adding~~ adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.

~~Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b). Because of the potential overlap of (d) and (e), their combined impact is limited to three points. However, a defendant who falls within both (d) and (e) is more likely to commit additional crimes; thus, (d) and (e) are not completely combined.~~

## **§4A1.2. Definitions and Instructions for Computing Criminal History**

### **(a) Prior Sentence**

- (1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.
- (2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1~~(f)~~(c).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were

imposed, use the aggregate sentence of imprisonment.

\* \* \*

(k) **Revocations of Probation, Parole, Mandatory Release, or Supervised Release**

- (1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.
- (2) ~~(A) — Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for §4A1.1(c) in respect to the recency of last release from confinement.~~  
  
(B) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (i) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (ii) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (see §4A1.2(d)(2)(A)); and (iii) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).

(l) **Sentences on Appeal**

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and ~~(f)(e)~~ shall apply as if the execution of such sentence had not been stayed; ~~§4A1.1(c) shall not apply.~~

\* \* \*

(n) **Failure to Report for Service of Sentence of Imprisonment**

For the purposes of §4A1.1(d)~~and (c)~~, failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

\* \* \*

(p) **Crime of Violence Defined**

For the purposes of §4A1.1~~(f)~~(e), the definition of "crime of violence" is that set forth in §4B1.2(a).

Commentary

Application Notes:

\* \* \*

12. Application of Subsection (c).—

- (A) In General.—*In determining whether an unlisted offense is similar to an offense listed in ~~subdivision~~ subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.*